90-1601

NO. ____

FILED
APR 15 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LILLIAN H. HALL, WILLIAM L. HALL, WALLACE G. GIBSON, BRENDA C. GIBSON, D/B/A JACKSON, TENNESSEE MOTEL PARTNERSHIP; R. VANCE BURKEY AND M. D. KELLY, INDIVIDUALLY AND AS PARTNERS OF JACKSON, TENNESSEE MOTEL PARTNERSHIP,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION AND SECURITY TRUST FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM S. LOCKETT, JR.
Fourth Floor, Sovran Center
550 Main Avenue
Knoxville, TN 37902
(615) 546-7311
Counsel of Record

RICHARD P. JAHN, JR.
620 Lindsay Street
Chattanooga, TN 37403
(615) 756-8473
Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO (513) 621-2880

QUESTIONS PRESENTED

1. Whether the *D'Oench* doctrine bars suit against the FDIC even when no assets have been acquired by the FDIC from a failed banking insitution?

PARTIES

PETITIONERS-APPELLANTS

(1) Lillian H. Hall*
(2) William L. Hall*
(3) Wallace G. Gibson*
(4) Brenda C. Gibson*
(5) R. Vance Burkey
(6) M. D. Kelly
(7) Jackson Tennessee Motel Partnership

RESPONDENTS-APPELLEES

(1) Federal Deposit Insurance Corporation
(2) Security Trust Federal Savings & Loan Association

* These parties filed voluntary petitions in bankruptcy subsequent to the commencement of this case, and the real parties in interest are their trustees in bankruptcy.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
PARTIES	II
TABLE OF AUTHORITIES	V
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. THERE IS A CONFLICT BETWEEN THE SIXTH AND TENTH CIRCUITS ON WHETHER THE FDIC IS INSULATED FROM SUIT UNDER THE *D'OENCH* DOCTRINE WHEN THERE ARE NO ASSETS TO PROTECT	7
II. THE ISSUE GIVING RISE TO THE SPLIT OF AUTHORITY BETWEEN THE SIXTH AND TENTH CIRCUITS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	10
III. THE ISSUE GIVING RISE TO THE SPLIT OF AUTHORITY BETWEEN THE SIXTH AND TENTH CIRCUITS INVOLVES THE PROPER INTERPRETATION OF A PRIOR DECISION BY THIS COURT, THEREFORE, ONE OF THE LOWER COURTS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	14
CONCLUSION	15

Page

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit filed November 28, 1990 ..... 1a

Memorandum and Order of the United States District Court for the Eastern District of Tennessee, Northern Division, granting FDIC's Motion for Summary Judgment and dismissing case, May 15, 1989 ..... 16a

Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing, January 16, 1991 ..... 24a

TABLE OF AUTHORITIES

Page

CASES:

Commerce Federal Savings Bank v. *Federal Deposit Insurance Corporation*, 872 F.2d 1240 (6th Cir. 1989) ... 11

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U.S. 447 (1942) 7, 8, 9, 10, 11, 12, 13, 14, 15

Federal Deposit Insurance Corporation v. Bracero & Rivera, Inc., 895 F.2d 824 (1st Cir. 1990) 11

Federal Deposit Insurance Corporation v. McClanahan, 795 F.2d 512 (5th Cir. 1986) 10, 11

Grubb v. Federal Deposit Insurance Corporation, 868 F.2d 1151 (10th Cir. 1989) 7, 9, 12, 13, 14

Hall v. Federal Deposit Insurance Corporation, 920 F.2d 334 (6th Cir. 1990) 1-2, 7, 9, 11, 12, 13, 14

Olney Savings & Loan Association v. Trinity Banc Savings Association, 885 F.2d 266 (5th Cir. 1989) ..7, 8, 9, 11

Thurman v. Federal Deposit Insurance Corporation, 889 F.2d 1441 (5th Cir. 1989) 11

NO. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LILLIAN H. HALL, WILLIAM L. HALL, WALLACE G. GIBSON, BRENDA C. GIBSON, D/B/A JACKSON, TENNESSEE MOTEL PARTNERSHIP; R. VANCE BURKEY AND M. D. KELLY, INDIVIDUALLY AND AS PARTNERS OF JACKSON, TENNESSEE MOTEL PARTNERSHIP,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION AND SECURITY TRUST FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered in this case on November 28, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been offically reported at *Hall* v. *Federal*

Deposit Insurance Corporation, 920 F.2d 334 (6th Cir. 1990) (Appendix, p. 1a).

The memorandum of the United States District Court for the Eastern District of Tennessee, Northern Division, Civil No. 3-88-693, has not been officially reported but is contained in the record (R. 34: Memorandum Opinion) (Appendix, p. 16a).

JURISDICTION

By Order dated November 28, 1990, the United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the Eastern District of Tennessee's decision granting respondents' Motions for Summary Judgment and dismissing petitioners' case. By Order dated January 16, 1991, the United States Court of Appeals for the Sixth Circuit denied petitioners' timely Motion for Rehearing. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Prior to the 1982 World's Fair ("Fair") in Knoxville, Tennessee, petitioners Burkey and Kelly conceived the idea of constructing a motel to hopefully take advantage of the expected influx of visitors to Knoxville during the Fair. The concept envisioned by Burkey and Kelly was that they would purchase pre-fabricated modular units and construct them on a site in Knoxville; after the Fair, the modular units would then be disassembled and moved to a permanent location elsewhere. Burkey and Kelly formed a corporation to construct and operate the motel. A loan in the amount of One Million Dollars ($1,000,000.00) was then obtained from United American Bank in Knoxville ("UAB") to purchase the modular units, construct the motel and operate the enterprise during the Fair.

During the Fair, Burkey and Kelly were introduced to the other petitioners, and together they formed a partnership. The petitioners located an undeveloped parcel of real property just off Interstate 40 in Jackson, Tennessee, and decided to relocate the motel in Jackson after the Fair; hence the partnership name of Jackson, Tennessee Motel Partnership (the "Partnership"). The petitioners decided to obtain a loan in an amount sufficient to pay off UAB and to transform the modular units into a permanent structure in Jackson.

Petitioner Burkey met with Mr. William Howard, then the president of Commerce Federal Savings & Loan Association, Inc. ("Commerce"), to inquire about the possibility of obtaining a loan. The negotiations with Commerce proved successful, and a loan commitment letter was issued by Commerce on November 17, 1982, in the amount of One Million Eight Hundred Fifty-Thousand Dollars ($1,850,000.00). The loan was closed on January 25, 1983, and immediately thereafter the process of relocating the modular units and constructing them in Jackson began.

When Commerce issued its commitment letter to the petitioners, Commerce had already entered into an agreement

with UAB whereby UAB would purchase a participation in Commerce's loan to the petitioners in the amount of One Million One Hundred Thousand Dollars ($1,100,000.00).

Unbeknownst to the petitioners, Commerce and UAB had not closed their participation agreement at the time of petitioners' closing with Commerce. When petitioners received their initial construction draw of Two Hundred Thousand Dollars ($200,000.00), UAB and Commerce still had not finalized their participation agreement. At no time during petitioners' loan closing with Commerce or thereafter were petitioners advised that funding would have to wait until UAB and Commerce consummated their participation agreement.

The Commissioner of Banking for the State of Tennessee closed UAB on February 14, 1983, and before the end of that month, a representative of Commerce verbally informed petitioners that Commerce would not advance any more funds under the loan. During February and March of 1983, petitioners attempted by various means to convince Commerce to continue funding the loan but were unsuccessful. In April, 1983, acting on advice of counsel, petitioners submitted a formal draw request to Commerce showing that sixty-six percent (66%) of the motel was completed. That draw request was never honored.

When Commerce stopped funding the loan, petitioners were unable to pay subcontractors that had provided services and materials in the construction of the motel. Those subcontractors then filed suit against the petitioners and caused liens to be placed on the motel property.

The petitioners were then in the position of having to seek a new lender in order to finish construction and simultaneously defend numerous lien claims and suits filed against them personally.

After more than two years, petitioners were finally able to obtain a loan to complete construction of the motel from

Jackson National Bank ("JNB") in Jackson, Tennessee. Out of the loan proceeds, petitioners paid Commerce in full and obtained releases (R. 16, Collective Ex. A). A letter from then counsel for the petitioners was hand-delivered to representatives of Commerce, stating that Commerce was being paid under protest so as to close the JNB loan and mitigate the petitioners' damages. The loan to petitioners from JNB was closed in October of 1985.

The present action was originally filed against Commerce in the Circuit Court for Knox County, Tennessee in April 1987. On August 26, 1988, four days before trial was scheduled to begin in the state court, Commerce was declared insolvent, and the FSLIC was appointed by the Federal Home Loan Bank Board as receiver for Commerce. Counsel for FSLIC then removed the instant case to the United States District Court for the Eastern District of Tennessee on August 29, 1988 (R. 1).[1]

On February 6, 1989, the FSLIC filed a Motion to Dismiss or in the Alternative for Summary Judgment on the ground that petitioners' suit was barred by the *D'Oench* doctrine. Petitioners filed a Response which asserted that because Commerce had been paid off two years prior to its being closed by the FSLIC, that there was no asset acquired by the FSLIC in need of the protections afforded under the *D'Oench* doctrine.[2]

On May 15, 1989, the District Court filed an Order (R. 35) and Memorandum Opinion (R. 34) granting the FSLIC's Mo-

---

[1] Jurisdiction in the District Court was proper under 12 U.S.C. § 1730(k)(1) (repealed 1989) and 28 U.S.C. §§ 1331 and 1346.

[2] This Court held in *D'Oench* that when the FDIC acquired a promissory note from a failed bank and filed suit to collect the note against the maker, the maker could not successfully raise as a defense that there was an undisclosed agreement between the maker and the failed bank that the note would not be collected. This prohibition against the successful enforcement of such secret agreements has come to be known as the *D'Oench* doctrine.

tion for Summary Judgment and dismissing petitioners' cause of action in its entirety. Petitioners filed a post-judgment Motion which was denied by the District Court on September 15, 1989 (R. 44). Petitioners filed a Notice of Appeal on October 13, 1989 (R. 45). On appeal, the Federal Deposit Insurance Corporation ("FDIC"), as manager of the FSLIC Resolution Fund, filed a Motion with the Sixth Circuit asking that it be substituted in the place of the FSLIC, which Motion was granted.

There is no dispute that petitioners paid Commerce in full two years prior to Commerce's being closed by the FSLIC.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT BETWEEN THE SIXTH AND TENTH CIRCUITS ON WHETHER THE FDIC IS INSULATED FROM SUIT UNDER THE D'OENCH DOCTRINE WHEN THERE ARE NO ASSETS TO PROTECT

There is a clear conflict between the Sixth Circuit and the Fifth and Tenth Circuits as to whether the protection afforded the FDIC under this Court's decision in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), extends to situations in which the FDIC has not acquired an asset from a failed banking institution. In the instant case, the Sixth Circuit held as follows: "The [*D'Oench*] doctrine may therefore be invoked even where FDIC does not have 'an interest in an asset.' " *Hall* v. *Federal Deposit Insurance Corporation*, 920 F.2d 334, 339 (6th Cir. 1990). In *Grubb* v. *Federal Deposit Insurance Corporation*, 868 F.2d 1151 (10th Cir. 1989), the Tenth Circuit held that because certain promissory notes acquired by the FDIC from a failed bank had been voided by a judgment entered prior to the FDIC's acquisition of those notes, the *D'Oench* doctrine did not apply. The Court held:

> Moreover, because of the judgment, First National no longer held valid notes when the FDIC took over as receiver. The FDIC cannot claim the protection of *D'Oench* when a judgment already has voided the asset.

Id. at 1159. (Emphasis added.)

The Tenth Circuit's holding in *Grubb* was followed by the Fifth Circuit in *Olney Savings & Loan Association* v. *Trinity Banc Savings Association*, 885 F.2d 266 (5th Cir. 1989),[3] the

---

[3] In *Olney*, the Fifth Circuit aligned itself with the Tenth Circuit's decision in *Grubb*. A split of authority was created by the decision below in the instant case when the Sixth Circuit rejected the position articulated by the Tenth Circuit in *Grubb*.

only difference being that in *Olney* the party arguing for application of the *D'Oench* doctrine was the FSLIC rather than the FDIC.

In the Fifth Circuit case, Olney Savings & Loan sued Trinity Banc Savings Association for rescission of a loan participation agreement. Olney alleged that it was induced to enter into the participation agreement by Trinity's fraudulent misrepresentations. Olney was successful in obtaining rescission of the participation agreement, and Trinity appealed. Subsequently, the FSLIC stepped in as conservator for the insolvent Trinity. On appeal, the FSLIC argued that the *D'Oench* doctrine served as a complete defense to Olney's claim that the participation agreement should be rescinded due to Trinity's fraudulent misrepresentations. The Fifth Circuit held:

> FSLIC complains now that it has a complete defense to the Participation Agreement's contemporaneous side agreements under the rule of *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), codified and expanded at 12 U.S.C. § 1823(e)[8] Though § 1823(e) has not been extended to protect the FSLIC, the *D'Oench* doctrine has. *Federal Savings & Loan Ins. Corp.* v. *Murray*, 853 F.2d 1251, 1254 (5th Cir. 1988). As the aims of § 1823(e) and *D'Oench* are identical and § 1823(e) is a codification of *D'Oench* and its progeny, the reasoning applied in § 1823(e) cases is applicable to *D'Oench* cases.
>
> Even though the misrepresentations fall within the *D'Oench* definition of "secret agreement," FSLIC acquired no asset when it stepped in as conservator. Because the Participation Agreement had been voided by the entry of judgment for rescission, *FSLIC acquired no right, title or interest that could be diminished or defeated by the misrepresentations.*

> *See Langley*, 108 S. Ct. at 402-403 (defense that renders instrument entirely void, as opposed to merely voidable, takes the instrument out of the protection of § 1823(e)); *Grubb* v. *Federal Deposit Ins. Corp.*, 868 F.2d 1151, 1158 (10th Cir. 1989) (instrument voided by entry of a judgment does not consitute a "right, title or interest" if acquired later by receiver).

885 F.2d at 274-75 (Emphasis added). Even though *Olney* involved the FSLIC rather than the FDIC, based on the *Olney* court's *ratio decidendi*, it is clear that the result would be the same in a case involving the FDIC. For all practical purposes, therefore, the split of authority on the question presented in this case involves not just the Sixth and Tenth Circuits, but the Fifth Circuit as well.

The *Hall* and *Grubb* decisions clearly demonstrate that the Sixth and Tenth Circuits are in hopeless conflict over whether the *D'Oench* doctrine applies in cases where no asset has been acquired by the FDIC. Although the *Olney* decision involved the FSLIC instead of the FDIC, the Fifth Circuit's reasoning in *Olney* left no doubt that on the same facts in a case involving the FDIC, the result would be the same. The conflict over whether *D'Oench* applies where no assets have been acquired by the FDIC, therefore, actually involves three circuits. That conflict, and the confusion engendered thereby, can only be resolved by this Court.[4] Rule 10.1(a), S. Ct. R.

[4] As an example of the confusion and conflicting opinions that can arise from the disparate views expressed in *Hall* and *Grubb*, one need only compare the majority and dissenting opinions in the instant case.

II. THE ISSUE GIVING RISE TO THE SPLIT OF AUTHORITY BETWEEN THE SIXTH AND TENTH CIRCUITS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The question presented in this petition concerns the interpretation of an opinion issued by this Court almost fifty years ago. When *D'Oench* was decided, the nation was still adjusting to the failure of a large number of banks during the Great Depression. The nation is again faced with the prospect of a large number of bank failures. A significant amount of litigation involving the FDIC will inevitably be spawned by those anticipated bank closings. The scope of the applicability of the *D'Oench* doctrine, therefore, is an important question of federal law upon which both the lower federal courts in deciding cases and the FDIC in conducting its bank liquidation activities are in need of a uniform rule of law. Every bank closing generates a rash of litigation. Given the current conditions, it is doubtless that the issue raised by this appeal will be a recurring one in the years to come.[5]

---

[5] The issue presented by this appeal, in addition to having been raised in the cases already discussed, also came up in *Federal Deposit Insurance Corporation* v. *McClanahan*, 795 Fd.2d 512 (5th Cir. 1986), but was pretermitted. In *McClanahan*, the court stated:

> McClanahan contends that the judgment of the district court can be affirmed on the ground that the $62,500 note was superseded by the forged $86,000 note *and thus was not an asset of Ranchlander Bank at the time the bank failed*. Although we are not aware of any federal authority on this question, the FDIC points out that under Texas law the renewal of a note leaves the holder of both notes free to sue on either of them unless novation is proven. McClanahan does not dispute this proposition. Because he does not, and indeed cannot, contend that the parties intended for the $86,000 note to extinguish the $62,500 note, we find that the $62,500 note was an asset of the bank when it failed.

Id. at 515 n.2. (Emphasis added). Rather than rejecting his legal theory the Fifth Circuit concluded that based on Texas law McClanahan was wrong in

The importance of the federal question raised by this appeal is not limited to the issue of whether the *D'Oench* doctrine applies in a "non-asset case". Of more significance is whether the holding in *D'Oench* must be given a narrow or more expansive reading. The importance of this dispute is amplified by the widely divergent justifications offered by those who would hold one way or the other.[6] The competing views represent markedly different philosophical and jurisprudential approaches to the issue raised. Juxtaposition of the majority and dissenting opinions issued by the court below clearly serves to illustrate the national importance of the question presented in this petition.

The majority in the court below held as follows:

> There are, however, instances where FDIC no longer has an interest in an asset, but where the logic of

---

asserting that the note was not an asset of Ranchlander Bank at the time it failed.

In the context of the present case, the significance of *McClanahan* lies in the simple fact that the *D'Oench* issue was raised. *See also Federal Deposit Insurance Corporation* v. *Bracero & Rivera, Inc.*, 895 F.2d 824 (1st Cir. 1990); *Thurman* v. *Federal Deposit Insurance Corporation*, 889 F.2d 1441 (5th Cir. 1989).

[6] The Sixth Circuit held in *Commerce Federal Savings Bank* v. *Federal Deposit Insurance Corporation*, 872 F.2d 1240 (6th Cir. 1989), that when the FDIC did not acquire any assets from a failed bank § 1823(e) could not be raised as a defense. To reach the result it did in the instant case, the majority in the court below had to somehow distinguish the *Commerce Federal Savings Bank* case. To achieve that end, the majority held: "We do not believe that the common law doctrine of *D'Oench* is limited by the terms of § 1823(e). It is settled that *D'Oench* and § 1823(e) are not identical in scope." 920 F.2d at 339.

Conversely, as discussed earlier, the Fifth Circuit held in *Olney* that: "As the aims of § 1923(e) and *D'Oench* are identical and § 1823(e) is a codification of *D'Oench* and its progeny, the reasoning applied in § 1823(e) cases is applicable to *D'Oench* cases." *Olney Savings & Loan Association* v. *Trinity Banc Savings Association*, 885 F.2d at 274.

Comparison of the above-quoted views of the Fifth and Sixth Circuits vividly reveals the wide divergence of opinion that separates those courts on the question presented herein.

> *D'Oench* should still apply to protect FDIC. For example, an obligor and a bank in receivership might have mutual breach of contract claims growing out of loan documents in the bank's records. The obligor, anticipating a suit by FDIC, might quickly pay off the note in an attempt to block FDIC's resort to the *D'Oench* doctrine. Under these circumstances, the fact that the obligor paid off the debt so as that FDIC did not have "an interest in an asset" should not prohibit FDIC from invoking *D'Oench*.

Hall v. *FDIC*, 920 F.2d at 339. With all due respect to the majority in the court below, to say that there are "instances where FDIC no longer has an interest in an asset, but where the logic of *D'Oench* should still apply to protect FDIC" is a *non sequiter*. The logic of *D'Oench* was that secret agreements should not be allowed to diminish assets acquired by the FDIC from failed banks. To say then, that the *D'Oench* doctrine applies even when the FDIC has not acquired an asset, is clearly not a conclusion that derives from "the logic of *D'Oench*." But rather, the Sixth Circuit's holding represents an unwarranted extension of blanket protection to the FDIC, which the majority accomplished under the guise of applying the *D'Oench* doctrine. This fact was recognized by the dissenting judge below, who stated:

> I dissent, however, because of my belief that the majority's opinion *unnecessarily expands* the protection afforded the FDIC under the *D'Oench* doctrine. In my view, *that doctrine was only intended to apply to situations where the FDIC acquires an asset from a failed institution*. As the plaintiffs had already paid back all the money they had borrowed, the FDIC did not acquire an "asset" for the purposes of *D'Oench*.

Id. at 341 (Jones, J. dissenting). (Emphasis added).

The views expressed by the dissent in the court below illustrate the position taken by the Tenth Circuit in *Grubb*.

Had the Sixth Circuit in the instant case followed the Tenth Circuit's decision in *Grubb*, the logical symmetry of the body of federal common law fashioned around *D'Oench* would have remained intact. The majority's holding in *Hall*, however, represents more than just a broadening of the *D'Oench* doctrine, but an attempt by a panel of the Sixth Circuit Court of Appeals to formulate new policy in an area that is the sole province of the Congress.

Moreover, since the question presented in this case involves interpreting one of this Court's own prior decisions, and since there has arisen a conflict over the correct interpretation between at least two circuit courts of appeal, this Court is uniquely situated to resolve both the important question of federal law and the conflict between the circuits.

III. THE ISSUE GIVING RISE TO THE SPLIT OF AUTHORITY BETWEEN THE SIXTH AND TENTH CIRCUITS INVOLVES THE PROPER INTERPRETATION OF A PRIOR DECISION BY THIS COURT, THEREFORE, ONE OF THE LOWER COURTS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The Sixth Circuit in *Hall* held that the *D'Oench* doctrine applies even when the FDIC does not acquire an asset from a failed bank, but the Tenth Circuit in *Grubb* held that in such situations *D'Oench* does not apply. Both circuits cannot be correct. Either *Hall* is correct and *Grubb* wrong, or *vice versa*. Nothwithstanding which circuit is correct, since *D'Oench* was decided by this Court, either the Sixth or the Tenth Circuit "has decided a federal question in a way that conflicts with applicable decisions of this Court." Rule 10.1(c), S. Ct. R. For that reason, this petition should be granted.

CONCLUSION

There is a clear split of authority between the Sixth and Tenth Circuits over whether the *D'Oench* doctrine applies in cases where the FDIC has acquired no assets. Whether the *D'Oench* doctrine applies in such situations is a question that is likely to recur; therefore, this petition should be granted in order to resolve the conflict between the circuits.

The scope of the *D'Oench* doctrine and whether it applies in cases where the FDIC has not acquired an asset is also an important question of federal law. As the ultimate expounder of federal law, this Court should grant this petition in order to address the question presented herein.

Finally, either the Sixth Circuit or the Tenth Circuit has decided a federal question in a way that conflicts with *D'Oench*, a prior decision of this Court; therefore, this petition should be granted so that the error in interpretation by one of the lower courts can be corrected.

For all of the foregoing reasons, petitioners respectfully request that this petition be granted and that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

William S. Lockett, Jr.
KENNERLY, MONTGOMERY &
FINLEY, P.C.
Fourth Floor, Sovran Center
550 Main Avenue
Knoxville, Tennessee 37902
(615) 546-7311

Counsel of Record

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 89-6350

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LILLIAN H. HALL, WILLIAM L. HALL, WALLACE G. GIBSON, BRENDA C. GIBSON, d/b/a JACKSON, TENNESSEE MOTEL PARTNERSHIP; R. VANCE BURKEY and M.D. KELLY, Individually and as partners of Jackson, Tennessee Motel Partnership,
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and SECURITY TRUST FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

(Decided and Filed November 28, 1990)

Before: JONES and BOGGS, Circuit Judges; and GIBBONS,* District Judge.

* The Honorable Julia Smith Gibbons, United States District Judge for the Western District of Tennessee, sitting by designation.

BOGGS, Circuit Judge, delivered the opinion of the court, in which GIBBONS, District Judge, joined. JONES, Circuit Judge, (pp. 14-16) delivered a separate dissenting opinion.

BOGGS, Circuit Judge. This case presents the question whether the Federal Savings and Loan Insurance Corporation (FSLIC) may invoke the doctrine of *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), as a complete bar to this suit for breach of a loan agreement by a failed savings and loan association. In light of *D'Oench's* prohibition against the introduction of any evidence of side agreements not incorporated into the loan agreement, we affirm the order of the district court.

I

In April 1987, the plaintiffs sued Commerce Federal Savings and Loan Association, Inc. (Commerce) in Tennessee state court for breach of a loan agreement, claiming that Commerce failed to fund fully a $1.85 million loan.[1] On August 26, 1988, four days before trial was scheduled to begin, FSLIC was appointed by the Federal Home Loan Bank Board as receiver for Commerce.[2] Substantially all of Commerce's assets and liabilities were then acquired from FSLIC by Security Trust Federal Savings and Loan Association (Security Trust). However, an assignment agreement between FSLIC and Security Trust, executed contemporaneously with the acquisition agreement, expressly removes from

---

[1] The plaintiffs are Lillian H. Hall and William L. Hall, and Wallace G. Gibson and Brenda C. Gibson, d/b/a Jackson, Tennessee Motel Partnerhip, and R. Vance Burkey and M.D. Kelly, individually and as partners of Jackson, Tennessee Motel Partnership.

[2] The defendant in this case is now the Federal Deposit Insurance Corporation (FDIC), Manager of the FSLIC Resolution Fund, which was substituted for FSLIC by the court's order on December 4, 1989. The substitution was a result of Congress's decision to abolish FSLIC in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). As FSLIC was the original party involved in this case, we will refer to the defendant as FSLIC.

the liabilities assumed any liability resulting from this lawsuit. FSLIC then removed the case to federal court.

The district court permitted the plaintiffs to add Security Trust as a party. Security Trust filed a motion to dismiss, and FSLIC filed a motion for summary judgment, both of which the district court granted.

B&K Enterprises, Inc. (B&K), a corporation owned by plaintiffs Burkey and Kelly, had constructed a motel of modular units in Knoxville, to accommodate the anticipated high demand for hotel rooms during the 1982 World's Fair. Burkey and Kelly had obtained a $1 million loan from United American Bank of Knoxville (UAB) in order to build the motel. The UAB loan was secured by the modular units, and UAB was given a first priority lien on the units. Weak advance bookings at the motel forced B&K to default on the loan in 1982.

In order to salvage their investment in the Knoxville motel, Burkey and Kelly advertised the modular units for sale. The Halls and the Gibsons responded to an advertisement in the *Wall Street Journal*, and together the six plaintiffs decided to obtain a loan sufficiently large to allow them to pay off the UAB debt and to relocate the units in Jackson.

On January 20, 1983, the Halls, the Gibsons, Burkey and Kelly established the Jackson, Tennessee Motel Partnership for the purpose of constructing a motel off Interstate 40 in Jackson. On January 25, 1983, the Halls and the Gibsons entered a term loan agreement with Commerce in order to finance the project. Burkey and Kelly were not parties to the loan agreement, but they were guarantors on the promissory note between Commerce and the Halls and Gibsons. The loan agreement provided that Commerce would lend the plaintiffs $1.85 million to be used in defraying costs associated with relocating 96 modular units from Knoxville to Jackson. According to FSLIC, the units were to constitute security for the loan.[3]

---

[3] The loan agreement stated that the loan would be secured by a prior security interest in "all furniture, furnishings, fixtures, trade fixtures, tools,

The plaintiffs claim that they believed UAB would be participating in the loan with Commerce. On November 18, 1982, Commerce wrote to UAB to confirm that UAB had committed to purchase a participation in Commerce's loan to the plaintiffs in the amount of $1.1 million. Jack Patrick, a vice president of UAB, countersigned the confirmation letter. However, a particpation agreement between UAB and Commerce had not been completed by the time the plaintiffs closed the loan with Commerce. The term loan agreement between Commerce and the plaintiffs provided that Commerce would not be obligated to fund more than $750,000 if UAB did not participate in the loan.[4]

At the January 25, 1983 closing, the plaintiffs executed in Commerce's favor a deed of trust on the land in Jackson on which the motel was to be built. They also signed a security agreement, granting Commerce an interest in all personal property. Paragraph 1 of the security agreement parroted the language of the collateral requirement in the loan agreement. On the day of the closing, the plaintiffs requested that Commerce fund part of the loan; the bank agreed to disburse a first draw on the loan in the amount of $200,000.

In February 1983, Paul E. Bostic, a vice president at Commerce, notified the plaintiffs that Commerce would not further fund the loan due to their failure to honor their agreement to give Commerce a first priority lien on the modular units. On April 11, 1983, the plaintiffs issued a formal draw

---

machinery, equipment and inventory (meaning all merchandise, raw materials, work in progress, finished goods and other tangible property), and all accounts receivable, contract rights, general intangibles and other chattel paper now owned or hereafter acquired by Debtor, and used in connection with or relating to the 100-unit motel project in Jackson, Tennessee. . . ." On appeal, the plaintiffs do not dispute that the modular units constituted part of this collateral.

[4] This clause in the agreement appears to have been motivated in part by the fact that Commerce's legal lending limit in January 1983 was $1,114,349.

request for $300,000 that included evidence that about two-thirds of the motel's construction had been completed. Commerce refused to fund this request or any others. The plaintiffs were forced to stop construction on their motel. Unpaid subcontractors sued the plaintiffs and obtained liens on the motel property.

UAB and Commerce never entered a formal agreement for UAB to participate in the $1.85 million loan. Despite this fact, Jack Patrick of UAB indicated in an affidavit submitted in response to the motion for summary judgment that "it was understood between Commerce and UAB that Commerce would have a security interest in the modular units once they were moved to Jackson, Tennessee." On February 14, 1983, less than one month after the closing involving Commerce and the plaintiffs, the commissioner of banking for the state of Tennessee closed UAB; FDIC was appointed receiver. As of this date, UAB had apparently not released in writing its lien on the modular units. UAB's security interest in the units was on record as late as September 30, 1985. On that date, FDIC, as receiver of UAB, subordinated its security interest in the units (which it obtained through UAB) in favor of Jackson National Bank.

In October 1985, the plaintiffs secured a $1.5 million loan from Jackson National Bank. They used the proceeds to complete construction of the motel and to satisfy judgments and other debts arising out of the project, including the balance ($282,988.64) of the total principal and interest owed to Commerce. On August 26, 1988, Commerce was placed in receivership.

II

The first issue in this appeal is whether Security Trust should be reinstated as a party defendant. The district court granted Security Trust's motion to dismiss it as a party because the assignment agreement between Security Trust and FSLIC required FSLIC to assume all liability for the

plaintiffs' claims against Commerce.[5] The court deemed FSLIC to be the real party in interest and held that Security Trust's dismissal was required regardless of the outcome of the plaintiffs' suit against FSLIC.

The plaintiffs contest this decision on the ground that Security Trust volunteered to assume liability for the plaintiffs' claims against Commerce. The plaintiffs claim that since they never agreed to release Security Trust from the liability it voluntarily assumed, Security Trust cannot assign away its liability to the plaintiffs. Under common contract principles, the plaintiffs argue that Security Trust may not assign its liabilities without the plaintiffs' permission. While FSLIC may undertake to share in the liability assumed by Security Trust, Security Trust allegedly remains jointly and severally liable for any judgment award owed to the plaintiffs.

We reject the plaintiffs' argument because FSLIC acted within its statutory discretion in entering into an acquisition transaction in which it assumed liabilities arising out of this lawsuit. *See* 12 U.S.C. § 1729(f)(2)(a). We find no support in the record for the assertion that Security Trust voluntarily assumed any potential liability from this case. The assignment agreement indicates that Security Trust affirmatively insured that it would *not* be saddled with any such liabilities.

Furthermore, the acquisition agreement, executed contemporaneously with the assignment agreement, stated that Security Trust would succeed to *substantially* all of Commerce's assets and liabilities, thus permitting exceptions. Both the language of § 1729(f) and the terms of the assignment agreement and of the acquisition agreement contemplate the kind of assumption of liabilities undertaken by FSLIC. Under

---

[5] Paragraph 1 of the assignment agreement provides that "the FSLIC hereby assumes any obligations or liabilities of [Security Trust] arising out of . . . the case of [*Hall, et al.*] v. *Commerce Federal Savings Bank as Successor in interest to Commerce Savings and Loan Association, Inc., Defendants*, Circuit Court for Knox County, Tennessee, No. 2-270-87."

these circumstances, the district court properly dismissed Security Trust as a party defendant.[6]

III

A

The second issue is whether the district court erred by granting summary judgment to FSLIC on the ground that *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942), bars this action. The court held that the *D'Oench* doctrine, largely codified in 1950 at 12 U.S.C. § 1823(e),[7] supplied FSLIC with a complete defense to the breach of contract claim. *D'Oench* stands for the proposition that, in order to protect FDIC from "misrepresentations as to the . . . assets in the portfolios of banks which [FDIC] insures," secret agreements that tend to deceive banking authorities cannot be raised as a defense against FDIC when it seeks to enforce a note. *Id.* at 457-58. The fact that there is no actual deception or injury is irrelevant. *Id.* at 459. The district court held that *D'Oench* precluded the plaintiffs from presenting proof of any representations made by Commerce beyond the terms of the loan agreement. Thus, the plaintiffs were not permitted to use an alleged side agreement to refute the affirmative defense that they failed to give Commerce a priority security interest in the collateral, as required by the loan agreement.

The plaintiffs claimed in the district court that Commerce

---

[6] Given our disposition of this issue, we need not address whether Security Trust, as successor in interest to FSLIC, is protected by the doctrine of *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942).

[7] Although § 1823(e) applies by its terms to FDIC only, we have held that *D'Oench* doctrine applies to FSLIC and FDIC. *See Taylor Trust* v. *Security Trust Federal Savings and Loan Associations, Inc.*, 844 F.2d 337, 342 (6th Cir. 1988).

waived the condition in the loan agreement requiring them to give Commerce priority in the collateral. They asserted that Commerce's conduct at the closing, when it funded $200,000 of the loan, was a representation to them that they had satisfactorily complied with the terms of the agreement. The court found that even if Commerce made such a waiver, the waiver is not reflected in its records. Furthermore nothing in the record indicates that FSLIC was aware of Commerce's alleged waiver. The court held, therefore, that neither waiver nor estoppel, due to Commerce's conduct, could be attributed to FSLIC. The *D'Oench* doctrine was deemed applicable, despite the fact that FSLIC invoked it in its role as defendant rather than as plaintiff, because the unwritten waiver would have the effect of deceiving banking authorities. The authorities would have assumed from the terms of the loan agreement either that Commerce had no obligation to fund the loan because the plaintiffs had failed to supply all of the collateral or that it had a priority security interest in the collateral when in fact UAB retained priority. The district court also rejected any argument that UAB released its lien by means of its commitment to participate in the Commerce loan. It found that *D'Oench* prohibited reliance on this sort of side agreement, given that it was not incorporated into the loan agreement. The plaintiffs therefore could not dispute that Commerce rightfully refused to fund the full loan, since they failed to meet a condition precedent to the loan agreement and *D'Oench* barred any extrinsic proof to the contrary.

The plaintiffs' appeal assumes that the *D'Oench* doctrine has been completely codified at 12 U.S.C. § 1823(e). Section 1823(e) provides that no agreement that tends to diminish the FDIC's interest in an asset acquired from an insolvent bank is valid unless the agreement is in writing, was executed by the bank and the obligor, was approved by the bank's board of directors, and has been made a part of the bank's official records. In this case, the plaintiffs argue that Commerce did not own any "asset" when FSLIC assumed Commerce's assets and liabilities, because they paid off the loan in 1985, long before Commerce fell into receivership. Since the plaintiffs

owed Commerce nothing by August 1988, they argue that FSLIC had no interest in any Commerce asset and that *D'Oench*, like § 1823(e), is therefore inapplicable to their breach of contract claim. *See Commerce Federal Savings Bank* v. *Federal Deposit Insurance Corporation*, 872 F.2d 1240, 1245 (6th Cir. 1989).

The plaintiffs contend that the facts of this case distinguish it from those in which courts have protected FDIC from unwritten or secret agreements that diminish FDIC's rights in assets acquired from a failed bank. This is not a case where the obligor seeks to avoid payment on a note that came into FDIC's portfolio through an acquisition agreement. They argue that the *D'Oench* doctrine only applies when a claim is being made by FDIC (or FSLIC), not by the obligor.

B

We first address the plaintiffs' contention that the scope of the *D'Oench* doctrine is limited by the language of § 1823(e).[8] The plaintiffs maintain that the language of § 1823(e) restricts the application of the *D'Oench* doctrine to cases where FDIC (or FSLIC) has an interest in an asset of an insolvent bank; they then maintain that FSLIC never gained an interest in a Commerce asset, and that *D'Oench* is therefore inapplicable.

We do not believe that the common law doctrine of *D'Oench* is limited by the terms of § 1823(e). It is settled that *D'Oench* and § 1823(e) are not identical in scope. We have already recognized that the *D'Oench* doctrine has broader application than § 1823. *See Taylor Trust* v. *Security Trust Federal Savings and Loan Association, Inc.*, 844 F.2d 337, 342 (6th Cir. 1988) (applying the *D'Oench* doctrine to protect FSLIC, though § 1823(e) only protects FDIC). *See also Federal Deposit Insurance Corporation* v. *McClanahan*, 795

[8] Although the case law interpreting § 1823(e) may inform our decision, § 1823(e) is not directly implicated here, since § 1823(e) does not apply to FSLIC, the real party in interest.

F.2d 512, 514 n.1 (5th Cir. 1986) ("It has not been suggested that the enactment of § 1823(e) in 1950, as an amendment to the Federal Deposit Insurance Act, preempted the common law rule of *D'Oench, Duhme*"). At least one court has held that the *D'Oench* doctrine applies to protect FDIC in its capacity as receiver, although § 1823(e) offers no such protection. *Beighley* v. *Federal Deposit Insurance Corporation*, 868 F.2d 776, 783 (5th Cir. 1989). In most of the cases applying the *D'Oench* doctrine, FDIC did have, as required by § 1823(e), an interest in an asset of an insolvent bank, but typically because FDIC was suing to collect on a note in which FDIC had acquired an interest.

There are, however, instances where FDIC no longer has an interest in an asset, but where the logic of *D'Oench* should still apply to protect FDIC. For example, an obligor and a bank in receivership might have mutual breach of contract claims growing out of loan documents in the bank's records. the obligor, anticipating a suit by FDIC, might quickly pay off the note in an atempt to block FDIC's resort to the *D'Oench* doctrine. Under these circumstances, the fact that the obligor paid off the debt so as that FDIC did not have "an interest in an asset" should not prohibit FDIC from invoking *D'Oench*.

Another example is where FDIC holds an interest in a "negative asset." FDIC may possess documents that appear to have no value as an asset; a subsequent lawsuit by the obligor would convert the documents from having no value to having a negative value. The effect of an imposition on public funds is the same in the case where a lawsuit creates a negative asset as where it reduces the value of a positive asset. The *D'Oench* doctrine should protect FDIC in both cases. *D'Oench* is important for allowing banking authorities to determine exactly what a bank's assets and liabilities are. The doctrine may therefore be invoked even where FDIC does not have "an interest in an asset."

However, we find that *D'Oench* applies in any event, because FSLIC did have an interest in a Commerce asset. The plaintiffs paid off their $200,000 obligation before Commerce

fell into receivership, but the $200,000 represented only a partial funding of the $1.85 million embodied in the loan agreement. Commerce, like the plaintiffs, possessed a continuing interest in the entire loan agreement after the $200,000 was repaid. Clearly the obligations represented by the loan agreement were not extinguished upon repayment of the $200,000; otherwise, the plaintiffs would have no colorable breach of contract claim. When FSLIC succeeded Commerce in its rights and duties under the loan agreement, FSLIC assumed an interest in whatever obligations remained under the loan agreement. FSLIC does not, therefore, lack standing to assert a *D'Oench* defense.

C

We now consider whether FSLIC may invoke the *D'Oench* doctrine to defeat a borrower's defense to FSLIC's defense to a suit in contract rather than, as in *D'Oench* itself, simply to defeat a borrower's defense to an obligation on a note. In *D'Oench*, the Supreme Court prohibited the maker of a note from asserting an affirmative defense based on an unwritten agreement with the failed bank. FSLIC maintains, however, that the *D'Oench* doctrine applies in actions brought against the FSLIC as well as in actions brought by the FSLIC against a borrower. We agree.

In *Beighley* v. *Federal Deposit Insurance Company*, 676 F. Supp. 130 (N.D. Tex. 1987), *reconsideration denied*, 679 F. Supp. 625 (1988), *aff'd*, 868 F.2d 776 (5th Cir. 1989), the district court considered the applicability of § 1823(e) to claims *against* FDIC. The court held that:

> [t]o allow a claim *against* the FDIC asserting the very grounds that could not be used as a defense to a claim *by* the FDIC is to let technicalities stand in the way of principle. Moreover, the effect of such an approach would be to reduce actions Congress has allowed the FDIC to pursue to nullities since defendants could counterclaim and recover what they lost.

676 F. Supp. at 132 (emphasis in original). In affirming the district court, the Fifth Circuit held that the claim against FDIC was barred by the common law doctrine expressed in *D'Oench*, not by § 1823(e). 868 F.2d at 783-84.

We are persuaded by this reasoning. If, as the *Beighley* court observed, *D'Oench* did not apply to bar the introduction of evidence of a side agreement in a claim against FDIC (or FSLIC), then an obligor could circumvent the sound policy behind *D'Oench* by asserting as a counterclaim that which could not be asserted as an affirmative defense. *See Federal Deposit Insurance Corporation* v. *Lattimore Land Corporation*, 656 F.2d 139, 146 n.13 (5th Cir. Unit B 1981). In this case, the plaintiffs rely on the November 18, 1982 letter agreement between UAB and Commerce to argue that UAB released its lien on the 96 modular units as a matter of law. The plaintiffs failed, however, to incorporate this release into the loan agreement. The plaintiffs also failed to incorporate into the loan agreement, as the district court found, any evidence of the participation agreement, as the deal between UAB and Commerce was never concluded. Because "it would tend to deceive the banking authorities," the side agreement that the plaintiffs rely on is precisely the type of secret agreement barred by the Supreme Court in *D'Oench*. *Langley* v. *Federal Deposit Insurance Corporation*, 484 U.S. 86, 92 (1987).

Since the *D'Oench* doctrine is not limited to cases in which the claim is pressed by FSLIC rather than the obligor, it operates to preclude the plaintiffs' breach of contract action. Examiners for FSLIC could easily have overestimated the value of the loan agreement on the books because of the alleged unevidenced waiver of the collateral requirement. The land on which the new motel sits was apparently worth only $175,000. The modular units constituted the bulk of the collateral's value. Without a priority interest in those units, the loan agreement had much less (and possibly negative) value. The *D'Oench* doctrine is intended to avoid exactly this sort of potential confusion.

Where a failed bank or thrift has breached a written term

of a loan agreement, the obligor may, of course, sue FDIC as receiver without the bar of the *D'Oench* doctrine. But where, as here, the breach asserted depends on a side agreement that conflicts with the terms of the written loan agreement, a breach of contract claim cannot be sustained. Since under no version of these facts are the plaintiffs entitled to judgment as a matter of law, summary judgment for FSLIC was properly granted.[9] Fed. R. Civ. P. 56(c).

For the foregoing reasons, the order of the district court is AFFIRMED.

JONES, Circuit Judge, dissenting. I agree with the majority that application of the *D'Oench* doctrine is not necessarily limited to cases brought by the FSLIC, and that the district court correctly granted Security's motion to dismiss. I dissent, however, because of my belief that the majority's opinion unnecessarily expands the protection afforded the FDIC under the *D'Oench* doctrine. In my view that doctrine was only intended to apply to situations where the FDIC acquires an asset from a failed institution. As the plaintiffs had already paid back all the money they had borrowed, the FDIC did not acquire an "asset" for the purposes of *D'Oench*.

The majority broadens the scope of *D'Oench* to situations where the FDIC does not retain an interest in an asset. Its limits, however, should be recognized; otherwise, the burden on borrowers could become onerous and the powers of regulators more expansive. *See generally* Sontag, *To Thrift*

---

[9] The plaintiffs contended at oral argument that they had a valid breach of contract claim even if their proof was limited to the four corners of the loan agreement. However, the success of that claim depends on UAB's release of its lien, as allegedly evidenced by the November 18, 1982 confirmation letter. As noted above, as late as September 30, 1985, there were indications that a release was never effected. As of that date, UAB had a priority security interest in the modular units, which FDIC as receiver then subordinated in favor of Jackson National Bank. Therefore, as we hold that the confirmation letter is merely a side agreement to the loan agreement, the plaintiffs' claim cannot survive a motion for summary judgment.

Fraud Victims, Government Says 'Tough Luck', 13 Nat'l L.J. 3 (Sept. 24, 1990) (describing *D'Oench* as a "once-little-used doctrine . . . applied to nearly every major S&L failure as myriad borrowers try to get out from under their debts.").

I do not favor applying "the logic of *D'Oench*" to situations where the FDIC does not acquire an asset simply in order to protect the FDIC from liability. That an asset be acquired is a requirement frequently spelled out. The *D'Oench* decision itself spoke of "a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other *assets* in the portfolios of the banks which [the FDIC] insures[.]" 315 U.S. at 457 (emphasis added). The Supreme Court's most recent case dealing with 12 U.S.C. § 1823(e), which is the statutory version of *D'Oench*, stated that the policy behind section 1823(e) is "to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's *assets*." *Langley* v. *Federal Deposit Ins. Corp.*, 484 U.S. 86, 91 (1987) (emphasis added). *See also Vernon* v. *Resolution Trust Corp.*, 907 F.2d 1101, 1107 (11th Cir. 1990) ("[T]he *D'Oench* doctrine has been used to protect entities that have acquired *assets* of failed banks from the FSLIC.") (emphasis added).

While the majority concedes that section 1823(e) contains an asset requirement, it yet argues that *D'Oench* can protect the FDIC even when it has no interest in an asset. Whatever the differences in scope between section 1823(e) and *D'Oench*, however, I remain unconvinced that *D'Oench* can bar a claim when the FDIC does not retain an interest in an asset of a failed institution. In any event, the majority argues that the FSLIC did have an interest in an asset; the asset being "a continuing interest in the entire loan agreement after the $200,000 was repaid."

I would find that no asset was acquired because plaintiffs had paid back all of the money they borrowed from Commerce. *Commerce Federal Savings Bank* v. *FDIC*, 872 F.2d 1240, 1245 (6th Cir. 1989) (in case involving section 1823(e) codification of *D'Oench*, "deed of trust was not an acquired asset of the FDIC, because [appellant] . . . had satisfied all

outstanding indebtedness."). Our decision in *Commerce Federal* was followed by the First Circuit in another section 1823(e) case. The First Circuit stated that:

> even if there were a secret agreement between [the bank and its borrower], however, section 1823(e) would not entitle FDIC to recover on the note, because the note was discharged by the payment and cancellation of the underlying debt before FDIC ever obtained it. Since the note was invalidated by acts that were independent of the alleged secret agreement, the note was not an asset[.]

FDIC v. *Bracero & Rivera, Inc.*, 895 F.2d 824, 830 (1st Cir. 1990).

I would not apply *D'Oench* to bar plaintiffs' claim in this case. Instead, the merits of plaintiffs' claims under the terms of the loan agreement should be addressed. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-88-693

LILLIAN H. HALL, et al.,
Plaintiffs,

v.

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, et al.,
Defendants.

MEMORANDUM OPINION

This is an action brought by the plaintiffs against the Federal Savings and Loan Insurance Corporation (FSLIC) and Security Trust Federal Savings and Loan Association (Security) for breach of a loan agreement entered into by FSLIC's predecessor-in-interest, Commerce Savings and Loan Association, Inc. (Commerce). The case is currently before the Court on several motions. The FSLIC has filed a motion to dismiss or for summary judgment [Docs. 5, 6], to which the plaintiffs have responded [Doc. 16] and to which in turn the FSLIC and the plaintiffs have filed supplemental briefs [Doc. 19, 22]. Security has filed a motion to dismiss or to substitute a party defendant [Doc. 18], to which the plaintiffs have responded [Doc. 21] and the FSLIC has filed a brief in support of Security's motion [Doc. 20]. In addition, a motion by the FSLIC is still pending to allow it to amend its defenses [Doc. 4].

I. FACTS

Following the 1982 World's Fair in Knoxville, the plaintiffs formed a partnership to move a modular-unit motel from

Knoxville to Jackson, Tennessee. At the time the partnership was formed, the United American Bank (UAB) had a lien and security interest in the modular units. On January 25, 1983, the plaintiffs entered into a term loan agreement [Ex. A to the FSLIC's motion to dismiss or for summary judgment] with Commerce under which Commerce was to loan the plaintiffs 1.85-million dollars with which to move the modular units to construct a motel on a site in Jackson. The loan agreement stated that the loan would be collateralized by giving Commerce a priority security interest upon all personalty and other assets of the partnership "used in connection with or relating to the 100-unit motel project in Jackson, Tennessee . . .." [Ex. A. § 9.1(b).] A security agreement [Ex. D] executed on the same date contains a parallel clause to the same effect. See also Ex. C, UCC-1 financing statements. On the day of closing, Commerce disbursed $200,000.00 of the loan amount to the plaintiffs, despite the language of § 8.1 of the term loan agreement that required the borrower to meet all conditions prior to Commerce being obligated to disburse any loan funds and the fact that UAB had not released its security interest in the modular units from which the motel was to be constructed.[1]

Commerce and UAB, however, had previously executed a letter agreement dated November 18, 1982, in which UAB agreed to purchase a participation in the loan to the plaintiffs by April 3, 1983, "subject . . . to the understanding that in the event of a default by the [plaintiffs], [Commerce] will be entitled to full satisfaction of its said remaining portion of the loan . . . out of the collateral security . . . prior to [UAB's] being entitled to share therein." UAB agreed to execute any necessary documents that Commerce deemed necessary to perfect its priority in the collateral. [Ex. A to the plaintiff's supplemental memorandum in opposition to the FSLIC's motion to dismiss or for summary judgment.] Apparently, the plaintiffs understood that UAB was to participate in the loan

---

[1] This money was subsequently repaid by the plaintiff under protest in late 1985.

transaction with Commerce but were unaware of the terms of this participation. Nevertheless, the agreement entered into between the plaintiffs and Commerce does not refer to this participation arrangement; rather, it conditions Commerce's obligation to disburse funds on the plaintiffs' compliance with certain terms of the loan agreement. After execution of the loan documents, the plaintiffs began relocating the modular units from Knoxville to Jackson.

Prior to any release by UAB of its security interest, UAB was declared insolvent on February 14, 1983, and the Federal Deposit Insurance Corporation (FDIC) was appointed receiver for UAB. Subsequently, Commerce verbally informed the plaintiffs that no futher draw requests on the loan would be honored because it did not have priority on the modular units. The plaintiffs attempted to resolve the loan problems with Commerce but were unsuccessful. Eventually, in October, 1985, the plaintiffs succeeded in obtaining a loan from a bank with which to complete the project but they suffered substantial financial losses as a result of Commerce's refusal to honor their draw requests.

On April 21, 1987, this lawsuit was filed in State court and proceeded in due course until August 26, 1988, just four days prior to the trial date in State court, when Commerce was declared insolvent by the Federal Home Loan Bank Board, which appointed the FSLIC as receiver. [Ex. C to petition for removal.] On the same day, the FSLIC transferred certain assets and liabilities of Commerce to Security; however, the assignment agreement between the FSLIC and Security expressly excepts from the liabilities assumed by Security any liability arising from the present lawsuit, which was then in State Circuit Court. [Ex. D to petition for removal.] On August 29, 1988, the FSLIC filed the petition for removal to this Court. [Doc. 1.] On February 15, 1989, this Court permitted the plaintiffs to amend their complaint to add Security as a party. [Doc. 9.]

II. LAW

A. FSLIC's Motion to Dismiss or for Summary Judgment

The FSLIC contends that the plaintiffs' claim must fail for two related reasons, which are, (1) that the plaintiffs did not fulfill the conditions precedent to Comnerce's obligation to fund the loan because they failed to secure priority for Commerce's security interest in the collateral as required by the express terms of the loan agreement, which thus triggers application of (2) the doctrine of *D'Oench, Duhme and Company* v. *FDIC*, 315 U.S. 447 (1942), because the plaintiffs rely on an alleged unwritten waiver of these conditions by Commerce and thus banking authorities would be misled because such a waiver did not appear in the records of the institution. The FSLIC contends that under the *D'Oench* doctrine the conduct of Commerce cannot estop the FSLIC and this doctrine is viable as a defense by the FSLIC in this case.

The plaintiffs argue that *D'Oench* does not apply because no undisclosed fraudulent arrangement was created by the parties to the loan and the FSLIC has no asset of Commerce that must be protected as a matter of public policy to preserve the insurance fund. The plaintiffs take the position that the loan was in writing, executed by the parties at arm's length, duly approved by Commerce's loan committee, and maintained on the books of Commerce in the regular course of business.[2] Commerce and UAB were arranging to secure priority in favor of Commerce but the plaintiffs had no participation in this arrangement.

Recently, in *Langley* v. *FDIC*, 108 S.Ct. 396 (1987), the United States Supreme Court elaborated on the *D'Oench* doctrine as codified in 12 U.S.C. § 1823(e). The court observed that

---

[2] The *D'Oench* has been codified at 12 U.S.C. sec. 1823(e). Section 1823(e) applies to the FDIC only, however. See footnote 3.

> "one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counter promise . . . or the truthfulness of a warranted fact."

Id., at 402. Moreover, the Court "conclude[d] . . . that neither fraud in the inducement nor knowledge by the FDIC is relevant to the section's application." *Id.* The rationale of § 1823(e) and of *D'Oench* does not necessarily require a fraudulent, unrecorded agreement, but rather any unwritten agreement that relieves the borrower from the express terms reflected in the financial institution's records and that would have the effect of misleading banking authorities are all that is required.[3]

An examination of the loan agreement in this case reveals that the plaintiffs, not Commerce, were required to secure priority in favor of Commerce on the collateral. If Commerce waived this condition, this waiver is not reflected on the records of the institution. Whether Commerce itself would be estopped in a lawsuit by its conduct in disbursing the first $200,000.00 draw on the loan is no longer relevant because once the FSLIC is appointed the receiver of an insolvent institution, it can be bound only by the express terms of instruments contained in the institution's records. *See FDIC* v. *MM & S Partners*, 626 F.Supp. 681, 685-688 (N.D. Ill. 1985). Nothing in the record before the Court indicates that the FSLIC was or could have become aware of the alleged waiver by Commerce. Moreover, as the Sixth Circuit held in *Taylor Trust* v. *Security Trust Federal Savings and Loan Association*, 844 F.2d 337, 342 (6th Cir. 1988), "traditional rules of con-

---

[3] The *D'Oench* doctrine is equally applicable to the FSLIC. *E.g.*, *FSLIC* v. *Murray*, 853 F.2d 1251, 1254 (5th Cir. 1988); *Taylor Trust* v. *Security Trust Federal Savings and Loan Association, Inc.*, 844 F.2d 337, 342 (6th Cir. 1988).

tract law are not applicable to the present case because the FSLIC has special status under federal substantive common law . . .."

The Court, therefore, concludes that neither waiver nor estoppel due to the conduct of Commerce can be attributed to the FSLIC when nothing in the bank's records would provide adequate notice of such an agreement. A second conclusion that follows from this is that the *D'Oench* doctrine applies in this case. The unwritten waiver of the loan agreement conditions would have the effect of deceiving banking authorities because the loan agreement provided that Commerce would have a priority security interest in the collateral when in fact priority was retained by UAB. *Cf. FSLIC* v. *Hsi*, 657 F.Supp. 1333 (E.D. La. 1986). The plaintiffs could have protected themselves either by obtaining a written, recorded waiver of the conditions or by incorporating the loan participation arrangement between Commerce and UAB into the terms of their agreement with Commerce.

Furthermore, *D'Oench* is available to the FSLIC as a defense against the plaintiffs' breach of contract claim. A similar case, *Beighley* v. *FDIC*, 676 F.Supp. 130 (N.D. Tex. 1987), involved a suit for breach of a loan contract by a lender that was subsequently declared insolvent and for which the FDIC was appointed as receiver. In *Beighley*, the District Court held that

> "[t]o allow a claim against the FDIC asserting the very grounds that could not be used as a defense to a claim by the FDIC is to let technicalities stand in the way of principle. Moreover, the effect of such an approach would be to reduce actions Congress has allows the FDIC to pursue to nullities since defendants could counterclaim and recover what they lost."

Id., at 132. In short, "[p]laintiffs' affirmative claim is only as good as their defenses . . .." *Id.*

Consequently, the Court is of the opinion that the plaintiffs' claim is barred by the *D'Oench* doctrine. The Court

recognized that the result is harsh but finds that the FSLIC's motion for summary judgment should be granted. This disposition makes ruling on the viability of the plaintiffs' claim for punitive damages unnecessary.

B. Security's Motion to Dismiss or to Substitute a Party Defendant

Under the terms of the agreements transferring certain assets and liabilities of Commerce to Security, the FSLIC assumed all liability for some claims against Commerce, including the present claim. The FSLIC is the real party in interest, *FSLIC* v. *Dillon Construction Company, Inc.*, 681 F.Supp. 1359, 1363-1364 (E.D. Ark. 1988), and thus dismissal of the plaintiffs' claim against Security would be required regardless of the disposition of the claim against the FSLIC.

III. CONCLUSION

Accordingly, the Court ORDERS:

1. That the FSLIC's motion for summary judgment [Doc. 5, 6] is GRANTED;
2. That Security's motion to dismiss [Doc. 18] is GRANTED; and
3. That the FSLIC's motion to amend its defenses [Doc. 4], which the parties have apparently treated as having been allowed in their motions and briefs, is GRANTED.

This case is, therefore, DISMISSED. The FSLIC's pending motion for oral argument [Doc. 26] is, thus, DENIED as moot.

ENTER:
/s/ LEON JORDAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-88-693

LILLIAN H. HALL, et al.,
Plaintiffs,

v.

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, et al.,
Defendants.

ORDER

For the reasons stated in its Memorandum Opinion filed on this same date, the Court ORDERS:

1. That FSLIC's motion for summary judgment [Docs. 5, 6] is GRANTED;
2. That Security Trust's motion to dismiss [Doc. 18] is GRANTED; and
3. That the FSLIC's motion to amend its defenses [Doc. 4] is GRANTED.

This case is, therefore, DISMISSED. The FSLIC's pending motion for oral argument [Doc. 26] is, thus, DENIED as moot.

ENTER:
/s/ LEON JORDAN
United States District Judge

No. 89-6350

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LILLIAN H. HALL, ET AL.,
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, ET AL.,
Defendants-Appellees.

BEFORE: JONES and BOGGS, Circuit Judges; and
GIBBONS*, United States District Judge

ORDER

(Filed January 16, 1991)

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN, Clerk

* Hon. Julia S. Gibbons sitting by designation from the Western District of Tennessee.

Supreme Court, U.S.
FILED
MAY 29 1991
OFFICE OF THE CLERK

No. 90-1601

In the Supreme Court of the United States

OCTOBER TERM, 1990

LILLIAN H. HALL, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

JOAN E. SMILEY
Senior Counsel

DANIEL H. KURTENBACH
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the *D'Oench* doctrine bars petitioners' claim that a failed bank that was taken over by FSLIC had breached an undocumented agreement to overlook petitioners' failure to meet certain conditions imposed by the loan documents.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Beighley v. *FDIC*, 868 F.2d 776 (5th Cir. 1989)	5
Bowen v. *FDIC*, 915 F.2d 1013 (5th Cir. 1990)	5
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942)	3, 7, 8
FDIC v. *McCullough*, 911 F.2d 593 (11th Cir. 1990)	8
FSLIC v. *Gemini Management*, 921 F.2d 241 (9th Cir. 1990)	5
FSLIC v. *Two Rivers Asociates, Inc.*, 880 F.2d 1267 (11th Cir. 1989)	5
Grubb v. *FDIC*, 868 F.2d 1151 (10th Cir. 1989)	7, 8
Olney Savings & Loan Ass'n v. *Trinity Banc Savings Ass'n*, 885 F.2d 266 (5th Cir. 1989)	7, 8
Timberland Design, Inc. v. *First Service Bank for Savings*, No. 90-1862 (1st Cir. May 3, 1991)	5
Twin Construction, Inc. v. *Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991)	5

Statutes:

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 101 103 Stat. 183	2
12 U.S.C. 1823(e)	4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1601

LILLIAN H. HALL, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 920 F.2d 334. The opinion of the district court (Pet. App. 16a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1990. A petition for rehearing was denied on January 16, 1991. Pet. App. 24a. The petition for a writ of certiorari was filed on April 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 26, 1988, the Federal Home Loan Bank Board declared Commerce Federal Savings and Loan Association, Inc. (Commerce) insolvent, and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) receiver for Commerce.[1] On that same date, substantially all of the assets and liabilities of Commerce were transferred to Security Trust Federal Savings and Loan Association. However, any liability relating to the instant lawsuit was assumed by FSLIC in its corporate capacity. Pet. App. 2a-3a.

2. Among the books and records of Commerce was a term loan agreement dated January 25, 1983, together with a note, guaranty, deed of trust, and security agreement, all evidencing an agreement by Commerce to loan $1.85 million to petitioners to develop a motel in Jackson, Tennessee. The term loan agreement provided that petitioners would grant Commerce a first and prior security interest in, among other things, the furniture, fixtures, and equipment relating to the motel, including the modular units from which the motel was to be built. Pet. App. 3a-4a & n.3. The security agreement purported to grant Commerce that security interest. *Ibid.* The term loan agreement further provided that Commerce would not be obligated to fund more than $750,000 if United American Bank of Knoxville (UAB) did not participate in the loan. UAB confirmed by letter that it had committed to purchase a participation interest in the loan in the amount of $1.1 million, but UAB and Commerce

---

[1] As a result of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 101, 103 Stat. 183, FSLIC was abolished, and its remaining assets and liabilities were transferred to the FSLIC Resolution Fund, under the management of the FDIC. The FDIC was substituted for FSLIC in this case in December 1989. Pet. App. 2a n.2.

never formally executed a participation agreement. Pet. App. 4a.

On the day that the loan closed, Commerce disbursed a first draw on the loan in the amount of $200,000. Shortly thereafter, in February 1983, Commerce notified petitioners that it would not continue to fund the loan because of petitioners' failure to grant Commerce the promised first and prior security interest in the modular motel units. Pet. App. 4a. Petitioners obtained substitute financing for the motel in October 1985. At that time they repaid (under protest) the $200,000 advance from Commerce, with interest. *Id.* at 5a.

3. Petitioners commenced this lawsuit against Commerce in April 1987. Pet. App. 2a. Petitioners claimed that Commerce's partial funding of the loan at closing constituted a waiver of the condition in the loan agreement that petitioners give Commerce a first lien on the collateral. *Id.* at 7a-8a. On May 15, 1989, the district court granted FSLIC's motion for summary judgment, finding that the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), applied to bar petitioners' claims of breach of contract based upon the assertion of a waiver or release not appearing in Commerce's records. Pet. App. 16a-23a.[2]

[2] *D'Oench* established a rule of estoppel that protects FDIC from a bank's misrepresentations concerning its assets and liabilities and from agreements not reflected in the bank's records. In *D'Oench*, FDIC attempted to collect on a promissory note it had acquired from a bank. The maker raised as a defense his side agreement with the bank that the note would never be called. This Court barred that defense as contrary to "a federal policy to protect [FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which [FDIC] insures or to which it makes loans." 315 U.S. at 457. The opinion set out the following test for application of the *D'Oench* doctrine:

> The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would

4. A divided panel of the court of appeals affirmed. Pet. App. 1a-13a.

The court first considered petitioners' claim that *D'Oench* did not apply in instances in which FDIC had never acquired an interest in the "asset" involved in an alleged unrecorded agreement. Although the court noted that 12 U.S.C. 1823(e) does include an express "asset" requirement,[3] the court found that *D'Oench* was not "limited by the terms of § 1823(e)." Pet. App. 9a-10a (citing cases).

In particular, the court noted that there may be a number of "instances where FDIC no longer has an interest in an asset, but where the logic of *D'Oench* should still apply to protect FDIC." Pet. App. 10a. For example, an individual who owes a debt to a bank in receivership and who believes

---

be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [FDIC] relied in insuring the bank was or was likely to be misled.

Id. at 460.

[3] Section 1823(e) provides:

> No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

Prior to the enactment of FIRREA, § 1823(e) by its terms applied only to FDIC, not to FSLIC.

he has a claim based on an undocumented agreement with the bank might "quickly pay off the note in an attempt to block FDIC's resort to the *D'Oench* doctrine" as a defense to the individual's claim against the failed bank. *Ibid.* Similarly, FDIC may acquire loan documents from a failed bank that appear to have no value as assets, but that then become the subject of a later lawsuit in which an individual asserts a claim against the failed bank based on an undocumented agreement. The court of appeals found that in both of those cases, "*D'Oench* is important for allowing banking authorities to determine exactly what a bank's assets and liabilities are." *Ibid.* Therefore, according to the court, the *D'Oench* doctrine may be invoked "even where FDIC does not have 'an interest in an asset.'" *Ibid.*

Alternatively, the court held that on the facts of this case "*D'Oench* applies in any event, because FSLIC did have an interest in a Commerce asset"—the loan agreement itself. Pet. App. 10a. According to the court, Commerce, like petitioners, "possessed a continuing interest in the entire loan agreement after the $200,000 was repaid." *Id.* at 11a. Accordingly, "[w]hen FSLIC succeeded Commerce in its rights and duties under the loan agreement, FSLIC assumed an interest in whatever obligations remained under the loan agreement." *Ibid.*[4]

[4] In a holding not challenged by petitioners, the court unanimously held that FDIC could use *D'Oench* to defend against affirmative claims as well as to defeat the defenses of obligors. Pet. App. 11a-13a, 13a (Jones, J., dissenting on other grounds). Accord *Timberland Design, Inc.* v. *First Service Bank for Savings*, No. 90-1862 (1st Cir. May 3, 1991) (agreement to make additional loan to fund development project); *Beighley* v. *FDIC*, 868 F.2d 776 (5th Cir. 1989) (agreement to provide financing to a third party); *Bowen* v. *FDIC*, 915 F.2d 1013 (5th Cir. 1990) (promise to extend additional loan as part of debt restructuring); *FSLIC* v. *Gemini Management*, 921 F.2d 241 (9th Cir. 1990) (promise to fund entire renovation project); *FSLIC* v. *Two Rivers Associates, Inc.*, 880 F.2d 1267 (11th Cir. 1989) (agreement to fund entire development project); *Twin Construction, Inc.* v. *Boca Raton, Inc.*, 925 F.2d. 378 (11th Cir. 1991) (promise to pay construction costs).

Judge Jones dissented. Pet. App. 13a-15a. He would have held the *D'Oench* doctrine inapplicable, both because the doctrine in his view applies only when FDIC acquires an interest in an asset and because he would have held that Commerce's interest in the loan agreement was not an asset acquired by FDIC.

ARGUMENT

1. This case does not raise the question petitioners seek to present. Contrary to petitioners' assumption (see Pet. 7, 12-13, 14), the court of appeals did not simply hold that the *D'Oench* doctrine may be invoked in the absence of an asset. Rather, in a portion of the opinion neither challenged nor even mentioned by petitioners, the court expressly held that FSLIC *did* have an interest in an asset of the failed bank. Although petitioners had "paid off their $200,000 obligation before Commerce fell into receivership" (Pet. App. 10a-11a), the loan agreement at issue provided for a $1.85 million loan. As the court noted, the "obligations represented by the loan agreement were not extinguished upon repayment of the $200,000; otherwise, the plaintiffs would have no colorable breach of contract claim." *Id.* at 11a. Therefore, FSLIC acquired "an interest in whatever obligations remained under the loan agreement" and does not "lack standing to assert a *D'Oench* defense." *Ibid.*

The court of appeals thus plainly held that FSLIC acquired an asset when it acquired Commerce. That holding is sufficient to dispose of this case, regardless of how the question presented by petitioners—"[w]hether the *D'Oench* doctrine bars suit against FDIC even when no assets have been acquired by the FDIC from a failed banking institution" (Pet. i)—is answered. Therefore, the question presented by petitioners is not in fact raised by this case,

and further review of the decision of the court of appeals is unwarranted.

2. In any event, the court of appeals' discussion of the question presented by petitioners was correct and does not conflict with decisions of the Tenth Circuit in *Grubb* v. *FDIC*, 868 F.2d 1151 (1989), and of the Fifth Circuit in *Olney Savings & Loan Ass'n* v. *Trinity Banc Savings Ass'n*, 885 F.2d 266 (1989).

In *Grubb* and *Olney*, plaintiffs each sued a financial institution, asserting an affirmative claim against the institution arising out of a loan transaction. In each case, the financial institution in turn defended on the ground that the plaintiff had obligations owed to it. The respective district courts granted judgment to plaintiffs on their affirmative claims, invalidating the financial institutions' claims against plaintiffs. After the district court judgments, the financial institutions failed and were taken over by FSLIC or FDIC. *Grubb*, 868 F.2d at 1154; *Olney*, 885 F.2d at 270. The courts of appeals held that FSLIC and FDIC could not use the *D'Oench* doctrine in those circumstances to defeat the plaintiffs' claims.

In *Grubb* and *Olney*, plaintiffs obtained judgment against the failed financial institution, not FSLIC or FDIC. In the view of the *Grubb* court, the *D'Oench* rule therefore could not be invoked to reverse district court judgments valid when entered against now-failed financial institutions. See 868 F.2d at 1159. Cf. *Olney*, 885 F.2d at 275 (rejecting argument that recent statutory change permitted "conservators to raise [12 U.S.C. 1823(e) claims] on appeal for the first time, after the entry of a final judgment to which they were not a party").

In addition, the *Grubb* court concluded that the judgment voiding the assets and determining the affirmative claims in the case before it provided a "reliable record" both

of the value of the assets (zero) and the institution's liability at the time of FSLIC or FDIC takeover. 868 F.2d at 1159. Or, as the *Olney* court reasoned, "because a final judgment existed when FSLIC entered as conservator, the purposes of *D'Oench* * * * [would] not be impaired" if the judgment were left intact. 885 F.2d at 275. In both cases, entry of the district court judgment prior to the bank's failure was viewed as eliminating a predicate for application of the *D'Oench* doctrine—an agreement not reflected in official records or books available to federal banking authorities.

Unlike *Grubb* and *Olney*, this case presents a core application of the *D'Oench* doctrine. First, even if correct, the decisions in *Grubb* and *Olney* would only preclude FSLIC or FDIC from invoking *D'Oench* to obtain appellate reversal of a district court judgment valid when entered. In this case, however, petitioners instituted suit against FSLIC after Commerce had failed. *Grubb* and *Olney* therefore would not stand in the way of FSLIC's invocation of *D'Oench* in the district court in this case. Second, at the time FSLIC acquired Commerce, there was no judgment or other "reliable record" of Commerce's alleged waiver of petitioners' obligation under the loan agreement to convey to Commerce a prior security interest to the modular motel units. Lifting the *D'Oench* bar in this case would thus frustrate one of the "two main purposes" of *D'Oench*—to "permit[] federal and state banking examiners to rely on a bank's records in evaluating the fiscal soundness of the institution." *Grubb*, 868 F.2d at 1158. Cf. *FDIC* v. *McCullough*, 911 F.2d 593, 600 (11th Cir. 1990) (noting that the "evil to be prevented" by *D'Oench* is an attempt by the private party "to rely upon unrecorded promises or schemes that purport to impose obligations other than those appearing in the bank's records upon the financial institution").

Because *Grubb* and *Olney* raised fundamentally different issues concerning the application of the *D'Oench* doctrine

than does this case, the decisions in those cases do not conflict with the decision reached by the Sixth Circuit here. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

JOAN E. SMILEY
Senior Counsel

DANIEL H. KURTENBACH
Counsel
Federal Deposit Insurance Corporation

MAY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20565

Supreme Court, U.S.
FILED
JUN 17 1991
OFFICE OF THE CLERK

(3)

NO. 90-1601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LILLIAN H. HALL, ET AL.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

William S. Lockett, Jr.
Kennerly, Montgomery & Finley, P.C.
Sovran Center, Fourth Floor
550 Main Avenue
Knoxville, Tennessee 37902
(615) 546-7311
Counsel of Record

G. Wendell Thomas, Jr.
Kennerly, Montgomery & Finley, P.C.
Of Counsel

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO (513) 621-2880

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
ARGUMENT	1
I. THE FEDERAL RESPONDENT IS INCORRECT IN ASSUMING THAT PETITIONERS DO NOT CHALLENGE THE COURT OF APPEALS' HOLDING THAT FSLIC ACQUIRED AN ASSET	1
A. The Court of Appeals' Holding that FSLIC Acquired an Asset is a Subsidiary Question Fairly Included in the Question Presented	1
B. It was Improper for the Court of Appeals to Raise Issues Contrary to the Factual Predicate Relied on by All Parties in the District Court	3
C. No Asset was Acquired by the FSLIC	4
II. THE HOLDINGS BY THE FIFTH AND TENTH CIRCUITS IN *OLNEY* AND *GRUBB* WERE NOT LIMITED TO THE FACTS IN THOSE CASES	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

Commerce Federal Savings Bank v. *Federal Deposit Insurance Corporation*, 872 F.2d 1240 (6th Cir. 1989) 5, 6

Cool Fuel, Inc. v. *Connett*, 685 F.2d 309, 312 (9th Cir. 1982) 4

D'Oench, Duhme & Co. v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942) 1, 3, 5, 6, 7, 8, 9

Federal Savings & Loan Insurance Corporation v. *Gemini Management*, 921 F.2d 241 (9th Cir. 1990) ... 7

Federal Savings & Loan Insurance Corporation v. *Two Rivers Associates, Inc.*, 880 F.2d 1267 (11th Cir. 1989) 7

Fountain v. *Filson*, 336 U.S. 681, 683 (1949) 3

Grubb v. *Federal Deposit Insurance Corporation*, 868 F.2d 1151 (10th Cir. 1989) 7, 8, 9, 10

Heinz v. *Commissioner of Internal Revenue*, 770 F.2d 874, 876 (9th Cir. 1985) 4

Olney Savings & Loan Ass'n v. *Trinity Banc Savings Ass'n*, 885 F.2d 266 (5th Cir. 1989) 6, 7, 8, 9, 10

Twin Construction, Inc. v. *Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991) 6, 7

NO. 90-1601

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LILLIAN H. HALL, ET AL.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THE FEDERAL RESPONDENT IS INCORRECT IN ASSUMING THAT PETITIONERS DO NOT CHALLENGE THE COURT OF APPEALS' HOLDING THAT FSLIC ACQUIRED AN ASSET

A. The Court of Appeals' Holding that FSLIC Acquired an Asset is a Subsidiary Question Fairly Included in the Question Presented

The question presented in this case by the petitioners is "[w]hether the *D'Oench* doctrine bars suit against the FDIC

even when no assets have been acquired by the FDIC from a failed banking institution". Pet. i. The respondent argues in its Brief in Opposition (hereinafter cited as "Brief Opp.") that because the court of appeals held FSLIC acquired an asset when it acquired Commerce, "[t]his case does not raise the question petitioners seek to present." Brief Opp. 6. That argument by the respondent is premised on the assertion that the court of appeals *was correct* in holding that the FSLIC acquired an asset. Contrary to the respondent's assumption, petitioners do challenge that holding.

Rule 14.1(a), S. Ct. R., states in pertinent part, as follows:

> The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

The question posed by petitioners assumes "no assets have been acquired . . . ." Therefore, the holding to the contrary by the court below is a "subsidiary question fairly included" in petitioners' question presented.

It is required that special and important reasons be brought to this Court's attention before a petition for a writ of certiorari will be granted. Rule 10.1, S. Ct. R. The function of a petition for a writ of certiorari is to demonstrate that such special and important reasons are present in a given case, not to argue the merits of the lower court's holding on those issues. Petitioner humbly suggest that the petition filed in this case does state reasons sufficient to warrant review on the merits by this Court. It is only within the context of that review, however, that the lower court's holding that an asset *was* acquired becomes significant.

B. It was Improper for the Court of Appeals to Raise Issues Contrary to the Factual Predicate Relied on by All Parties in the District Court

At no stage of the proceedings below, either in the district court or the court of appeals, did either of the respondents ever contend that FSLIC acquired an asset. Nor did the district court or the court of appeals ever question whether there was a dispute as to whether an asset had been acquired. It must also be remembered that this case was decided by the district court on cross-motions for summary judgment. By ruling in favor of the respondents, the district court held that there were no material factual disputes between the parties. However, without the development of a factual record or briefs by the litigants on the question of whether the FSLIC acquired an asset from Commerce, in its opinion the majority below for the first time interjected an issue in this case not theretofore in dispute. This Court has previously ruled that it is improper for an appellate court to enter summary judgment "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court." *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949). Whether the FSLIC acquired an asset from Commerce when it failed was not a fact in issue when the district court granted the FSLIC's motion for summary judgment. The district court's ruling was premised on the uncontested fact that Commerce had *not* acquired an asset, but that the FSLIC was nevertheless entitled to judgment as a matter of law. It is that holding that was briefed and argued in the court of appeals. The eagerness of the majority in the court below to beg the question of whether the FSLIC did or did not acquire an asset suggests that the majority is less than comfortable with its decision on the real legal question present in this case: Does *D'Oench* apply when *no* asset has been acquired? Since all parties assumed for purposes of the cross-motions for summary judgment that *no* asset was acquired by the FSLIC, and since it was on that basis that the district court ruled on the motions, it cannot be said that petitioners had "a full and fair oppor-

tunity to ventilate the issues" raised *sua sponte* by the majority in the court below, that an asset was acquired by the FSLIC. *Heinz* v. *Commissioner of Internal Revenue*, 770 F.2d 874, 876 (9th Cir. 1985); *Cool Fuel, Inc.* v. *Connett*, 685 F.2d 309, 312 (9th Cir. 1982). Since it was improper for the court of appeals to raise the issue, it is respectfully submitted that it would also be improper to deny the petition for a writ of certiorari on that same ground.

C. No Asset was Acquired by the FSLIC

While petitioners do not intend to argue the merits of this case at this stage of the proceeding, since respondent has raised the issue, prudence requires that petitioners briefly address the majority's holding that an asset was acquired. The majority reasoned as follows:

> Commerce, like the plaintiffs, possessed a continuing interest in the entire loan agreement after the $200,000.00 was repaid. Clearly the obligations represented by the loan agreement were not extinguished upon repayment of the $200,000.00; otherwise, the plaintiffs would have no colorable breach of contract claim. When FSLIC succeeded Commerce in its rights and duties under the loan agreement, FSLIC assumed an interest in whatever obligations remained under the loan agreement.

Pet. App. 11a.

First, the majority is incorrect in saying that "Commerce, like the [petitioners] possessed a continuing interest in the entire loan agreement after the $200,000.00 was repaid." The fact that petitioners brought suit for breach of contract shows that they possessed a chose in action based on Commerce's breach of the loan agreement, not "a continuing interest in the entire loan agreement" itself. Second, when the majority states that "the obligations represented by the loan agreement were not extinguished upon repayment of the $200,000.00;

otherwise, the [petitioners] would have no colorable breach of contract claim", the court must have been referring to *obligations* on the part of Commerce. Petitioners certainly did not owe any further obligations to Commerce after paying off the loan in full and obtaining releases in 1985. R. 16, Collective Ex. A. The undisputed facts regarding whether there was an asset for the FSLIC to acquire when Commerce was closed can be summarized as follows: petitioners signed a loan agreement with Commerce in 1983 and drew $200,000.00 on a construction loan; petitioners paid off the loan in full, under protest, in 1985, and releases were obtained from Commerce; petitioners brought suit against Commerce in 1987 for breach of the loan agreement. Can this Court let stand a characterization of the "obligations" owed by Commerce to the petitioners as assets? According to generally accepted accounting principles, owing an obligation is characterized as a liability.

This Court's decision in *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation*, 315 U.S. 447 (1942) was based on "a federal policy to protect . . . the securities or other *assets* in the portfolios of the banks which [the FDIC] insures. . . ." *Id.* at 457 (emphasis added). Since no assets were acquired in this case, the federal policy that gave birth to the *D'Oench* doctrine is not implicated and the decision of the court below should be reversed.

The analysis of the majority in the court below on the question of whether FSLIC acquired an asset is flawed in another very important respect. As pointed out in the petition, another panel of the Sixth Circuit held in *Commerce Federal Savings Bank* v. *Federal Deposit Insurance Corporation*, 872 F.2d 1240 (6th Cir. 1989), that when the FDIC does not acquire any assets from a failed bank § 1823(e) cannot be raised as a defense. To avoid application of the *Commerce Federal* decision to the instant case, the majority below held: "We do not believe that the common law doctrine of *D'Oench* is limited by the terms of § 1823(e). It is settled that *D'Oench* and § 1823(e) are not identical in scope." 920 F.2d at 339.

Apparently, the majority below felt that by concluding *D'Oench* was broader than § 1823(e), *Commerce Federal* was of no precedential value in considering the outcome of the instant case. What the majority below failed to recognize was that in *Commerce Federal*, as in this case, all obligations owed to the insured financial institutions were paid in full prior to the time they were closed. Ignoring that significant fact, the majority in the court below held that *Commerce Federal* was of no precedential value in this case because the issue presented herein concerns the application of the *D'Oench* doctrine, while the panel in *Commerce Federal* was concerned with Section 1823(e).[1] The *Commerce Federal* decision cannot be so easily brushed aside. In both *Commerce Federal* and the instant case obligations owed to insured financial institutions were paid in full prior to the time those institutions were closed. In *Commerce Federal* a Sixth Circuit panel decided no asset was acquired, but in the instant case another Sixth Circuit panel, under the same facts, decided an asset was acquired. In that regard, the majority below did not distinguish the *Commerce Federal* decision, and quite frankly, there is no way it can.

With all due respect to the majority below and the respondent, the contention that the FSLIC acquired an asset is a red herring. The FSLIC assumed a contingent liability. It did not acquire an asset. For that reason, and the reasons stated above, petitioners still believe the petition to be well taken and respectfully request that it be granted.

---

[1] It is ironic that several of the cases cited by respondent in its Brief in Opposition conclude that the *D'Oench* doctrine and § 1823(e) are functional equivalents. One of the cases, *Twin Construction, Inc.* v. *Boca Raton, Inc.*, 925 F.2d 378 (11th Cir. 1991), cites the Fifth Circuit case relied on in the petition to demonstrate that a conflict exists between the Fifth and Sixth Circuits, *Olney Savings & Loan Ass'n* v. *Trinity Banc Savings Ass'n*, 885 F.2d 266 (5th Cir. 1989). The *Twin Construction* court held:

> [C]ourts have found the aims of section 1823(e) and *D'Oench* identical and thus have construed defenses premised upon section 1823(e) and *D'Oench* in tandem. *Id. See also Vernon*, 907 F.2d at 1105; *Olney Sav. & Loan Ass'n* v. *Trinity Banc Sav. Ass'n*, 885

II. THE HOLDINGS BY THE FIFTH AND TENTH CIRCUITS IN *OLNEY* AND *GRUBB* WERE NOT LIMITED TO THE FACTS IN THOSE CASES.

Respondent also attempts to harmonize the result reached by the majority in the court below with the decisions of the Tenth Circuit in *Grubb* v. *Federal Deposit Insurance Corporation*, 868 F.2d 1151 (10th Cir. 1989), and the Fifth Circuit in *Olney Savings & Loan Ass'n* v. *Trinity Banc Savings Ass'n*, 885 F.2d 266 (5th Cir. 1989). The respondent contends that the holdings in both *Grubb* and *Olney* were limited to their specific facts, and that since the facts of the instant case are distinguishable, there is actually no conflict. While petitioners concede that the facts in the case at bar are different from those present in *Grubb* and *Olney*, it is *not* true that those decisions were limited to their specific facts. Both the Tenth Circuit in *Grubb* and the Fifth Circuit in *Olney* clearly articulated the broad principle that the *D'Oench* doctrine has

---

F.2d 266, 274 (5th Cir. 1989); *Beighley* v. *FDIC*, 868 F.2d 776, 784 (5th Cir. 1989).[2]

Twin Construction, Inc. v. *Boca Raton, Inc.*, 925 F.2d at 382. The above-quoted language is from the text of the opinion, but as can be seen there is also a footnote dealing with the same subject matter. The footnote is even more enlightening than the text regarding the Eleventh Circuit's views on the dichotomy between § 1823(e) and the *D'Oench* doctrine. The footnote states:

> We thus need not determine whether, because FDIC was substituted for FSLIC prior to the entry of summary judgment, the statutory codification in section 1823(e) rather than the common law of *D'Oench* and its progeny should apply to this case. *We will reach the same result regardless.*

Id., n.2 (emphasis added.) *See also Federal Savings & Loan Insurance Corporation* v. *Gemini Management*, 921 F.2d 241 (9th Cir. 1990); *Federal Savings & Loan Insurance Corporation* v. *Two Rivers Associates, Inc.*, 880 F.2d 1267 (11th Cir. 1989). It would seem, therefore, that the Ninth and Eleventh Circuits are also in conflict with the Sixth Circuit's holding in the instant case "that *D'Oench* and § 1823(e) are not identical in scope." Pet. App. 9a.

no application to situations in which no assets are acquired from failed insured institutions. The courts in *Grubb* and *Olney* outlined the facts simply in order to explain why no assets were acquired.

In *Grubb*, Grubb sued First National Bank & Trust Company of Oklahoma City ("First National") for securities fraud under state and federal laws. First National counterclaimed against Grubb alleging that it was due payment on certain promissory notes from Grubb. A jury returned a verdict awarding Grubb damages against First National in the amount of $2,722,629.88 and dismissing First National's counterclaims for payment on the notes. First National appealed. During the pendency of the appeal, First National was closed and the FDIC substituted as appellant. The FDIC then argued that it was protected by the *D'Oench* doctrine. The Tenth Circuit held, however, that "[t]he FDIC cannot claim the protection of *D'Oench* when a judgment already had voided the asset." 868 F.2d at 1159.

Likewise, in the *Olney Savings & Loan* case, Olney sued Trinity and obtained rescission of a participation agreement. Trinity then appealed, and, as in *Grubb*, the FSLIC stepped in as conservator for Trinity while the case was on appeal. The FSLIC then argued that the *D'Oench* doctrine served as a complete defense to Olney's claim that the participation agreement should be rescinded. The Fifth Circuit held, however:

> Even though the misrepresentations fall within the *D'Oench* definition of "secret agreement," FSLIC acquired no asset when it stepped in as conservator. Because the Participation Agreement had been voided by the entry of judgment for rescission, FSLIC *acquired no right, title or interest that could be diminished or defeated by the misrepresentations.*

885 F.2d at 274-75 (emphasis added).

Contrary to the arguments advanced by the respondent (Brief Opp. 7 & 8), the deciding factor in both *Grubb* and *Olney* was whether the FDIC and the FSLIC respectively acquired an asset from the failed institutions, not how or why assets were voided or diminished prior to those insured institutions being closed. It is obvious that the respondent misapprehends the import of the Tenth Circuit's decision in *Grubb* and the Fifth Circuit's decision in *Olney*.[2]

Interestingly, the respondent itself presented a substantial basis upon which the petition in this case should be granted when it questioned the correctness of the legal conclusions reached in *Grubb* and *Olney*. After questioning those decisions, the respondent speculated on what circumstances would justify withholding from the FSLIC or the FDIC the protection afforded under the *D'Oench* doctrine. The respondent's argument is as follows:

> First, *even if correct*, the decisions in *Grubb* and *Olney* would only preclude FSLIC or FDIC from invoking *D'Oench* to obtain appellate reversal of a district court judgment valid when entered.

---

[2] In attempting to distinguish the case at bar with *Grubb* and *Olney*, the respondent misstates the facts in the instant case. The respondent states: "In this case, however, *petitioners instituted suit against FSLIC after Commerce had failed.*" Brief Opp. 8 (emphasis added). The record clearly reflects that petitioners originally filed this suit against Commerce in state court in April of 1987, and that the case was removed to United States District Court in August of 1988 by the FSLIC after the Federal Home Loan Bank Board declared Commerce insolvent and appointed the FSLIC receiver. In any event, respondent is incorrect in stating that "petitioners instituted suit against FSLIC after Commerce had failed." Just as in *Grubb* and *Olney*, the FSLIC became a party in this case as a result of the failure of an insured institution after litigation against that institution had commenced. Also, just as in *Grubb* and *Olney*, prior to Commerce being closed, the assets that would have been acquired by the FSLIC, the note and deed of trust, were voided by being paid in full.

Brief Opp. 8 (emphasis added). The above-quoted passage from the Brief in Opposition reveals that the respondent is less than confident in arguing *Grubb* and *Olney* are limited to their facts. By half-heartedly questioning the correctness of those cases, the respondent is saying, in effect: there is no conflict between the holdings in *Grubb* and *Olney* and the holding by the majority in the instant case, but if there is a conflict, *Grubb* and *Olney* are wrong. The respondent's analysis regarding the fact specific nature of the Fifth and Tenth Circuit holdings in *Olney* and *Grubb* is superficial. Those decisions were not so limited. While petitioners believe *Grubb* and *Olney* were correctly decided, petitioners' opinion in that regard, and the respondent's contrary view, can only be resolved if the petition for a writ of certiorari is granted and this case decided on the merits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

William S. Lockett, Jr.
Counsel of Record

G. Wendell Thomas, Jr.
Of Counsel